Nos. 233, 234 and 235.

Supreme Court of the United States.

OCTOBER TERM, 1899.

Brf. of Pierce, Dillon, Kelly &

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Supreme Court U. S.
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No. 233.

THE CREDITS COMMUTATION COMPANY and THE COMBINATION BRIDGE COMPANY, *Appellants,*

vs.

THE UNITED STATES OF AMERICA ET AL., *Appellees.*

Filed Jan. 27, 1900.

Also No. 234.

SAME APPELLANTS

vs.

F. GORDON DEXTER and OLIVER AMES, Second, Trustees, ET AL., *Appellees.*

Also No. 235.

SAME APPELLANTS

vs.

OLIVER AMES, Second, and SAMUEL CARR, Executors, etc., ET AL., *Appellees.*

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLEES ON MOTIONS TO DISMISS APPEALS.

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Supreme Court of the United States.

OCTOBER TERM, 1899.

THE CREDITS COMMUTATION COMPANY and THE COMBINATION BRIDGE COMPANY, Appellants, AGAINST UNITED STATES OF AMERICA ET AL., Appellees.	No. 233.
SAME APPELLANTS AGAINST F. GORDON DEXTER and OLIVER AMES, SECOND, ET AL., Appellees.	No. 234.
SAME APPELLANTS AGAINST OLIVER AMES, SECOND, and SAMUEL CARR, Executors, *et al.* Appellees.	No. 235.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLEES ON MOTION TO DISMISS THE ABOVE-ENTITLED APPEALS.

Statement.

These are motions to dismiss (and in the alternative to affirm) appeals from orders made by the United States Circuit Court of Appeals for the Eighth Circuit, dismissing appeals to that Court from orders made by the United States Circuit Court for the District of Nebraska which denied applications of the Credits Commutation Company and of the Combination Bridge Company for leave to intervene in three causes pending in the last-mentioned court.

At the outset we encounter the anomaly of appeals taking in the Circuit Court of Appeals, as well as in this Court, titles wholly different from those of the causes in the Circuit Court in which the proceedings for intervention were had. There were no cases in the Circuit Court of the United States for the District of Nebraska bearing the titles of these appeals. The titles of the cases in which the orders appealed from were made and the order in which these cases were brought and their natures are as follows:

The first of the three causes (stating them in the order in which they were brought), entitled OLIVER AMES, SECOND, AND SAMUEL CARR, EXECUTORS, ETC., AGAINST THE UNION PACIFIC RAILWAY COMPANY ET AL., generally known and in this Brief referred to as the "Ames cause," was brought by stockholders and creditors of The Union Pacific Railway Company for the appointment of receivers and the administration of the properties of The Union Pacific Railway Company. The appeal to this Court from the order of the Circuit Court of Appeals dismissing the appeals

from the order of the Circuit Court which denied the petition for leave to intervene in this cause is presented in the record in this court, Docket No. 235.

The second of these causes, entitled F. GORDON DEXTER AND OLIVER AMES, SECOND, TRUSTEES, AGAINST THE UNION PACIFIC RAILWAY COMPANY ET AL., generally known and in this Brief referred to as the "Dexter cause," was brought by the trustees of the First Mortgage of The Union Pacific Railroad Company to foreclose that mortgage. The appeal to this court from the order of the Circuit Court of Appeals dismissing the appeals from the order of the Circuit Court which denied the petition for leave to intervene in this cause, is presented in the record in this Court, Docket No. 234.

The third of these causes, entitled THE UNITED STATES OF AMERICA AGAINST THE UNION PACIFIC RAILWAY COMPANY ET AL., generally known and in this Brief referred to as the "Government cause," was brought by the United States for the forclosure of its Subsidy Lien (coterminous with the first mortgage) upon the property of the Union Pacific Railroad between Council Bluffs, Iowa, and a point five miles west of Ogden, Utah. The appeal to this court from the order of the Circuit Court of Appeals dismissing the appeals from the order of the Circuit Court which denied the petition for leave to intervene in this cause, is presented in the record in this court, Docket No. 233.*

The petition of the Credits Commutation Company (No. 235: p. 46 *et seq.*) for leave to intervene was filed

* References to the records in this court will, for convenience and brevity, be by indication of the numbers of the cases on the docket of this Court.

in the Ames cause more than four years after that cause was instituted, and more than two years after the railroad had passed into the hands of the receivers in the mortgage foreclosure cause. It was filed in the Dexter cause (No. 234 : p. 52 *et seq.*) more than two years after that cause was instituted, and when that cause was ripe for final decree. It was filed in the Government cause (No. 233 : p. 42 *et seq.*) several months after its institution, and when, the issues having been made up, that cause was also substantially ripe for final decree.

The statement of the cases and of the nature of the petitions of the Credits Commutation Company and the Combination Bridge Company may be best and most compactly made in the language of the Circuit Court of Appeals (No. 233 : p. 177. No. 234 : p. 189. No. 235 : p. 178).

"These cases are before the Court on the present occasion on motions to dismiss the several appeals. The appeals were taken from orders made by the Honorable WALTER H. SANBORN, Circuit Judge, which denied the application of the Credits Commutation Company and the Combination Bridge Company, the appellants, for leave to intervene in three suits which were at the time pending in the circuit court of the United States for the district of Nebraska. One of these suits was a bill filed on October 9, 1893, by Oliver Ames, 2d, and Samuel Carr, Executors of the last will and testament of Frederick L. Ames, deceased, and others, which is commonly termed the "Stockholders' Suit" ["Ames cause"] the other was a bill which was filed on January 21, 1895, by F. Gordon Dexter and Oliver Ames, 2d, Trustees, against The Union Pacific Railway Company and others [Dexter cause], for the purpose of foreclosing the first mortgage on the Union Pacific Railway; and the third was a bill filed on January 23, 1897,

by the United States against The Union Pacific Railway Company and others [Government cause], for the purpose of foreclosing its statutory lien upon the property of said railway company. On April 28, 1897, when said cases were about ripe for a final decree, the Credits Commutation Company and the Combination Bridge Company presented an intervening petition to Judge SANBORN, and asked leave to file the same in each of said suits, and thereby become parties thereto. On the presentation of the intervening petition, an order was made requiring all parties in interest in said suits to show cause, on a day specified, why the prayer of the petitioners for leave to intervene should not be granted. [No. 233: p. 141. No. 234: p. 151. No. 235: p. 145.] On the return day of said order, objections to the filing of said intervening petition having been duly made and considered, it was ordered 'that the prayers of the petitioners for leave to intervene herein be, and the same are hereby, denied, not as a matter of discretion, but because said petiitons do not state facts sufficient to show that these petitioners, or either of them, have a legal right to intervene.' From this order which was entered at the same time and in the same form in each of the above cases, the present appeals were taken. [No. 233: p. 152. No. 234: p. 162. No. 235: p. 156.]

"The ground upon which the petitioners below, who are the appellants here, sought leave to intervene in the pending litigation against The Union Pacific Railway Company, was as follows: The Credits Commutation Company alleged that it was entitled, as beneficiary in a deed of assignment, to three-fourths of the capital stock of the Sioux City and Northern Railway Company, which was a railroad extending northwardly from Sioux City, Iowa, for a distance of about 100 miles, to a junction with the Great Northern Railroad, in the state of Minnesota; that it was also entitled to all of the stock of the Sioux City, O'Neill and Western Railroad, which was a road extending westwardly from Sioux City, Iowa, to O'Neill, Neb., a distance of about 130 miles; that these roads were connected at Sioux City, Iowa, by a bridge across the Missouri River, whose capital stock was all owned by the Credits Commutation Company; that the petitioners proposed to extend the Sioux City, O'Neill and Western Railroad to a junction with the Union

Pacific Railroad in the western part of the State of Nebraska; that their ultimate design was to form a line of transportation, by means of the aforesaid railroad and bridge companies, and certain terminal properties in Sioux City which the petitioners then owned, and thereby promote an interchange of traffic between the head of the Great Lakes, at Duluth, and the region of country lying west of the Missouri River, opposite to Sioux City. They further averred in the intervening complaint that, by virtue of various provisions of the act creating The Union Pacific Railway Company and the amendments thereof, particularly by sections 14 and 15 of the act of July 1, 1862 (12 Stat., 489, c. 120), and by section 17 of the act of July 2, 1864 (13 Stat., 356, c. 216), the right was accorded to the petitioners to form a junction with the Union Pacific Railroad, not farther west than the one hundredth meridian of longitude, whenever they should have completed their proposed line of railroad through the States of Iowa or Minnesota to Sioux City, and thence southwestwardly to a point on the main line of the Union Pacific Railroad. In view of the foregoing facts, the petitioners craved leave to intervene and be made parties to the three suits then pending against The Union Pacific Railway Company, to the end that they might, in the first place, resist, and, if possible, prevent a foreclosure sale of the property and franchises of said railroad company under decrees made in the pending suits, or, if defeated in that object, to the end that they might preserve their alleged right to connect their proposed line of railroad with the main line of The Union Pacific Railway Company, by appropriate provisions inserted in the decree of foreclosure, provided a foreclosure sale of the latter company's property and franchise should eventually be ordered."

The Circuit Court of Appeals sustained the motions to dismiss the appeals from the orders of the Circuit Court denying appellants leave to intervene and dismissed said appeals with costs, and the appeals now sought to be dismissed in this court are from those orders of dismissal made by the Circuit Court of Appeals (Orders: No. 233, p. 181; No. 234, p. 194; No. 235, p. 182).

If the orders of dismissal made by the Circuit Court of Appeals are not erroneous those orders must be affirmed here and the present appeals must be dismissed.

The Circuit Court of Appeals had no jurisdiction of the appeals taken to it from the orders of the Circuit Court denying the petitions for leave to intervene, and hence the orders of the Circuit Court of Appeals were correct, and, being correct the present motions in this court to dismiss the appeals taken to it must be sustained.

The GROUNDS of the present motion are as follows:

FIRST. The order of the Circuit Court of the United States, for the District of Nebraska, from which the said appeal to the Circuit Court of Appeals was taken, was not a final decision of the said Circuit Court of the United States within the meaning of Section 6 of the Act of Congress, approved March 3d, 1891, entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain causes the jurisdiction of the Courts of the United States, and for other purposes," and hence said Circuit Court of Appeals had no jurisdiction of the appeals taken to it, and, for like reason the Supreme Court has no jurisdiction of the present appeals.

SECOND. It was within the legal discretion of the Circuit Court of the United States, for the District of Nebraska, to

grant or deny the application of the appellants for leave to intervene in the pending causes, and that court in denying such application exercised its discretionary powers and its action could not be reviewed by the Circuit Court of Appeals and will not be reviewed by this Court.

THIRD. The appellants never became parties to the suits in which intervention was sought and in which the orders refusing such intervention were entered.

FOURTH. The petitions of the Credits Cmmutation Company and the Combination Bridge Company for leave to intervene and the order denying such petitions do not constitute a case within the meaning of the Constitution of the United States and of the Act of Congress of March 3d, 1891, establishing the Circuit Courts of Appeals and defining their jurisdiction, and hence,

FIFTH. The order of the Circuit Court of the United States, for the District of Nebraska, being non-appealable, and properly so held by the Circuit Court of Appeals, the same will not be reviewed by the Supreme Court on appeal from the order of the said Circuit Court of Appeals.

ARGUMENT.

I.

The orders of the Circuit Court denying the petitions for leave to intervene did not finally dispose of the cases in which such orders were made as to all the parties to the record, and for this reason were not "final decisions."

Section 6 of the Act of March third, 1891, provides as follows:

"That the Circuit Courts of Appeals established by this Act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding Section of this Act unless otherwise provided by law."

* * * * * *

This precise point has been decided by this Court in the case of *United States vs. Girault*, 11 How., 22. In that case it appeared that final judgment had been entered up against some of the defendants without disposing of the cause as to the others. This Court, on a writ of error, said (p. 32):

"* * *but the* judgment in the case should not have been finally entered until the cause was ready for final disposition as to all. The practice in this court, in case the judgment or decree is not final, is to dismiss the writ of error or appeal for want of jurisdiction, and remand it to the court below to be further proceeded in."

It is obvious that the order made in the foreclosure and other cases denying the petitioners leave to intervene, was not a "*final disposition as to all*" of the

parties. No decree of foreclosure had been entered, nor any other decree disposing of the issues raised by the complaint and answers.

In *Dainese vs. Kendall*, 119 U. S., 53, 54, this Court said:

"The authorities are uniform to the effect that a decree to be final for the purposes of an appeal must leave the case in such a condition that *if there be an affirmance here the court below will have nothing to do but to execute the decree it has already entered (Bostwick vs. Brinkerhoff*, 106 U. S., 3; *Grand vs. Phœnix Ins. Co.*, 106 U. S., 429, 431; *St. Louis & Iron Mountain & Southern Railroad vs. Southern Express Co.*, 108 U. S., 24, 28; *Ex Parte Norton*, 108 U. S., 237, 242; *Mower vs. Fletcher*, 114 U. S., 127*)*."

II.

No appeal lies from an order denying petition for leave to intervene in a pending cause.

It has been repeatedly held by this Court that, beyond the specific exceptions provided for in the Act of Congress of March 3d, 1891, no change was made by that act in the requirements of the previous statutes with respect to the character of decisions from which appeals may be taken, and that the question whether or not a decision is *final* remains the test of appealability as well under the act of 1891 as under the previous statutes.

On the subject, therefore, of the appealability of a judgment or order, the cases decided by the Court prior and subsequent to the act of 1891 are in harmony and equally apply the test of *finality* of the decision.

This subject is fully discussed in the cases of

McLish vs. Roff, 141 U. S., 661.
C., St. P., M. & O. Ry. Co. vs. Roberts, 141 U. S., 690.
American Construction Co. vs. Jacksonville, etc., R. R. Co., 148 U. S., 372.
Kirwan vs. Murray, 170 U. S., 205.

This makes the case of *Ex parte Cutting*, and other cases to which we will refer below, direct and conclusive authorities upon the proposition here made—*i. e.*, that the order of the Circuit Court denying leave to the petitioners to intervene in the pending causes was not an appealable order.

In the leading case of *Ex parte Cutting*, 94 U. S., p. 14, certain stockholders filed a petition in a pending suit brought for the foreclosure of a mortgage upon the property of a railroad company, and asked to be allowed to come in and defend said suit and be made defendants therein. It did not appear from the record whether any action was taken by the court upon this petition after it was filed. Subsequently such proceedings were had in the foreclosure suit that a decree of foreclosure and sale was entered in accordance with the prayer of the bill, none of the petitioners objecting in any manner against the decree. Afterwards a motion was made to confirm the sale, which had been made under the decree, and the same stockholders who had before filed the petition for leave to intervene again filed a petition asking for leave to intervene in order to set aside the decree of sale theretofore entered in the suit. This motion was denied by the court and the petitioner applied for the allowance of an appeal to this Court, which was also denied. The petitioners then asked for a mandamus to the Judges

of the Circuit Court, commanding them to grant an appeal to the Supreme Court. This Court held that the petitioners had never become parties to the suit in the court below and that no appeal would lie from the order of the Circuit Court denying the petition for leave to intervene. Mr. Chief Justice WAITE, reading the opinion of the court, said :

" Upon this state of facts it is impossible to say that the petitioners, or any of them, have established their right to appeal as actual parties to the suit before the decree.

No appeal lies from the order of October 3rd refusing them leave to intervene and become parties, for that was only a motion in the cause and not an independent suit in equity appealable here.

Neither can these petitioners appeal as stockholders. *Only parties, or those who represent them, can appeal.* The stockholders do not represent the Corporation ; but, for some purposes, the Corporation represents them. They are sometimes admitted as parties to a suit, for the purpose of protecting their own interests in the Corporation against unfounded and illegal claims against it, *but this 'remedy is an extreme one, and should be admitted by the court with hesitation and caution'* (Bronson vs. R. R. Co. *(supra). It is always addressed to the sound judicial discretion of the court.* That we cannot control by *mandamus.*"

In the present cases no claim or right of the appellants was passed upon or decided by the Circuit Court other than the right to intervene and become parties to the pending suits. The action of the Circuit Court left them perfectly free to assert their claims or rights (no matter whether substantial or fanciful) through an original bill, and such rights were not concluded or finally decided by the order of that court refusing to allow the assertion of such rights in cases to which the appellants were not parties.

The right of intervention in a pending and undetermined cause, AND THAT RIGHT ALONE *was denied and concluded by order of the Circuit Court.*

In such a case it is perfectly well-settled law, without any existing decisions to the contrary, that the order is not appealable.

All cases which may be suggested as authorities to the contrary of this proposition are easily distinguishable on obvious principle.

In all such cases in which the right of intervention was in any way considered or recognized in reversal of the court below, that subject was in the nature of a sequence or incident, and its decision merely followed the decision on other controlling questions which were involved in the appeal, and which primarily determined the right of appeal. In all such cases a complete record and case below had been made, and the decree or order, made upon pleadings, trial and hearing, had finally and conclusively adjudged the *substantial* rights of an intervenor, *and not merely his right to introduce himself into a case in which he was not made a party.* In every such case where the right of intervention so figured as an incident of an appeal from an order or decree, that order and decree finally decided and concluded the rights of the intervenors, so that they could not again be asserted by means of an original proceeding. And herein lies the controlling distinction, and makes the cases, thus distinguished, serve as emphasis to the rule that an order merely denying leave to intervene and concluding no right, except the alleged right of intervention *is not a* FINAL ORDER *and hence not* an APPEALABLE ORDER.

In the present case the order of the Circuit Court neither in its terms or essence

denied any other right of the appellants than their right to intervene and become parties to a particular pending and undetermined litigation. Whatever other rights they might possess were in no wise decided or concluded by the order of the court, and the appellants were left perfectly free to assert such rights in any court of competent jurisdiction.

In the case of *Hamlin vs. Railway Company*, 78 Fed. Rep., 664, the facts were as follows: Certain holders of preferred stock of a company petitioned the court to be made defendants and for leave to file an answer and cross bill in a suit then pending for the foreclosure of a first mortgage of a company. This application was granted subject to the right of the complainants to move to strike out the answer and cross-bill. The complainants did so move, and upon the motion an order was entered denying the petitioners the right to intervene or to file an answer or other pleading. From this order an appeal was taken, and the court held that an appeal would lie from this order as a final decree to the Circuit Court of Appeals, for the reason that the application of the petitioners to intervene had been granted, and that thereby they became parties, and that the order subsequently made dismissing them from the cause was a final decree; but the court further said that no appeal could have been taken from the original order granting the petition for intervention, that being a matter within the discretion of the court.

LURTON, Ch. J., reading the opinion of the Circuit Court of Appeals, for the Fifth Circuit, says:

"The allowance or denial of the application of a stranger to be admitted as a party defendant in a pending suit in equity rests in the sound discretion of the Chancellor. The denial of such an application is not such a final decree as is the subject of appeal under section 692 of the Revised Statutes. Such an application is a mere motion in the case made by one not a party and is not of itself an independent suit in equity appealable here (Citing cases). It follows, therefore, that if no other order had been made in reference to the application of appellants to become parties than that of May 14th, 1896, no appeal would lie and the motion to dismiss should have been sustained."

See also the case of *Toledo, St. L. & K. C. R. R. Co. vs. Continental Trust Company*, 95 Federal Reporter, 497, 536 (decided July 5, 1890), where the Circuit Court of Appeals for the Fifth Circuit, again following the case of *Ex parte Cutting (supra)* says:

"From a decree refusing leave to intervene and become a party no appeal lies."

The rule that an order denying leave to intervene in a pending and undetermined cause is not a *final* order and therefore not appealable, is reiterated in many of the cases which are cited under the next following proposition, and which hold that such an order is not appealable *for the further and independent reason* that the matter of permitting or denying leave to intervene in such a cause is one of *discretion* in the Court making the order.

III.

The principle is well settled that any decision which rests in the discretion of a court of original jurisdiction cannot be re-examined in an appellate court.

This Court, in the case of *Cook vs. Burnley*, 11 Wall., 672, 676, said that

"it is well settled that decisions which rest in the discretion of a court of original jurisdiction cannot be re-examined in an appellate court upon a writ of error" (citing numerous cases).

See, also, on this point, *Ex parte Cutting (supra)*.

In the case of *Connor vs. Peugh*, 18 Howard, 394, the case was brought to this Court by writ of error to the Circuit Court for the District of Columbia, and was heard on the motion to dismiss the writ. In this case, after a judgment in ejectment had been entered against the casual ejector, the tenant in possession came into court and moved to have the judgment set aside, and asked for leave to intervene. Mr. Justice GRIER, delivering the opinion of the court, said:

"The motion afterwards made to have the judgment set aside and for leave to intervene was an application to the sound discretion of the court. To the action of the court on such a motion no appeal lies, nor is it the subject of a bill of exceptions or writ of error."

In the case of *Hamlin vs. Railway Company*, 78 Fed. Rep., 664, which was cited above on the proposition that an order denying a petition for leave to intervene is not final, and, therefore, not appealable, the court proceeds to further discuss the order of May 14th, 1896 (referred to in the portion of the opinion

above quoted), granting to the petitioners the right to intervene and plead, and from which the court says appeal would not lie. Continuing, the Court says :

" If the court had continued the motion [for leave to intervene] until the pleadings had been examined and then denied leave to intervene because the answer made out no substantial defense the denial would not have been ground for an appeal."

[The questions arising in that case on the motion of the complainants to strike out the answer and cross-bill filed by the intervenors involved the discussion of the merits of the answer and cross-bill, and the opinion of the court below passed upon the merits of the claims asserted in the answer and cross-bill.] " The decree then entered, when construed in connection with the decree admitting appellants as parties, should be interpreted as one denying the appellants any relief upon the ground that neither their intervening petition nor their answer and cross-bill showed any such interest.

" *It is wholly a matter of discretion whether the court will allow such quasi parties to become formal parties to the cause by intervention. * * * The order refusing their petition to be made formal parties to the cause and denying the other relief asked for is not a final decision within the meaning of the Statute authorizing appeals to this court.*"

In the case of *Lewis vs. Railroad Company*, 62 Fed. Rep., 218, the facts were as follows :

A suit was pending in the court below against the Railroad Company brought by a stockholder and asking for the appointment of a receiver of the property of the company. Subsequently the trustee of the Second and General Mortgages of the Railway Company filed a bill for the foreclosure of these mortgages. Complainant in the stockholder's suit afterwards filed his petition in the case brought by the trustee praying that the two suits be consolidated. This petition was dismissed by the Circuit Court, and on the same day the petitioner filed his petition praying that he might be

made a party to the foreclosure suit. The prayer of this petition was also denied and the application dismissed. Subsequently the petitioner filed his petition for an allowance of an appeal from the rulings of the court refusing his petition for consolidation and his petition to be made a party. The petition was dismissed, its prayer having been denied and the petitioner then applied to the Circuit Court of Appeals praying that a mandamus might be issued to the Judges of the Court below commanding them to grant the petitioners an appeal from the said orders. This petition for mandamus was denied and the court said :

" With regard to the motion for consolidating * * * this was addressed to the discretion of the court and was wholly within its discretion (R. S. U. S., Section 921). We cannot by mandamus interfere with the Circuit Court in this exercise of its discretion.

" So, also, as to the petition to make Street a party in the Lewis case. He was not a necessary party, and, even were he a proper party, still this was within the discretion of the court. In the present instance this discretion was wisely exercised. * * * *Besides, this refusal of the Circuit Court to admit Street as a party is not an appealable order. It is in no sense a final judgment. It concludes no right.* In the language of WAITE, C. J., in *ex parte* Cutting, 94 U. S., 22, 'No appeal lies from the order refusing them leave to intervene and become parties. That was a motion in the case and not an independent suit in equity appealable here.' Were the courts of last resort to entertain appeals to make a person a party causes would be constantly going up piecemeal, great confusion would be created and insufferable delays caused."

In the case of *Smith vs. Glasgow Investment Co.*, 47 Fed. Rep., 332, Circuit Court of Appeals, Fourth Circuit, intervention by petition was allowed in a foreclosure case. The petitioner set up a simple contract claim against the company, and sought payment out of the mortgaged property *pari passu* with the bonds secured

by the mortgage. Demurrer was interposed to petition, and, upon hearing, the demurrer was sustained and the petition was dismissed. Exceptions were taken, and the cause came to the Circuit Court of Appeals on assignments of error. The court said :

"Objection was made to the intervention of the petitioner by way of petition instead of proving his demand before the Master. His intervention in this way makes him a party to the record. *This is a matter wholly within the discretion of the Judge below.*" (Citing *ex parte Cutting, supra.*)

In the present case the application was wholly denied by the order of the Circuit Court, and nothing appeared in the order to show that the court did anything else except deny the application.

In the case of *United States vs. Thomas*, 151 U. S., 577, the question presented by the motion was not determinable in the discretion of the court, and for that reason it was held that such question might be certified to the Supreme Court. In that case this Court said :

"It is the general doctrine that there can be no certificate of a division of opinion between the Judges of the Circuit Court on a motion for a new trial, as such motion usually rests in the discretion of the court, and therefore properly presents no question for our determination (citing case), but such is not always the case. Sometimes a motion of the kind, or of a similar kind, may present for consideration a question going directly to the merits, and a decision of which may determine the point in controversy. In such instances the court will consider the question submitted on a certificate of division of opinion between the Judges of the Court below."

In that case the motion went to the merits of the case, and presented for consideration a question upon the merits, and the decision involved a determination

of the merits. In the present cases the application presented no question upon the merits of the appellants' claims, and the order decided no such question. In its terms it declares that the only question decided was the right of the appellants to intervene in the pending causes.

It may be suggested here, as it was below, that the orders of the Circuit Court denying the motions for leave to intervene had some different significance in respect of appeal, because of the recital made in said orders that the petitions to intervene were denied "not as a matter of discretion, but because said petitions do not state facts sufficient to show that the petitioners or either of them have a legal right to intervene."

A little consideration will show that this recital in the orders can make no difference as to the legal effect of the orders. This is a statement of the opinion of the court, and the fact that it is inserted in the orders does not change its nature as such opinion. *The only material thing is the order.* The fact remains, notwithstanding any recital by the judge as to his opinion or reason for making the order, that the order was in the discretion—the "*judicial* discretion" as stated by this Court—of the Circuit Court. The reasons why the judge made the orders are immaterial so far as affects the question whether appeals will lie from them. Precisely such an argument as the one which the would-be appellants may seek here to make was made to this Court, and disposed by it, in the case of *Corning vs. Troy Iron and Nail Factory*, 15 How., 451. The court said (p. 464):

"It is true that the petition for the appeal in this case prays only 'that so much of such parts of said decree as declares, orders, adjudges and decrees as follows—to wit, "And it appearing to the said court that the said Henry Burden was the first inventor of the improvement," &c., may be reversed, and that the appellants may be restored to all things which they have lost by reason thereof.'

"But the matter complained of forms no part of the decree of the court below.

"It shows only that the judge, in reciting the inducement or reasons for entering a decree in favor of the respondents below was of opinion that they were entitled to such a decree, because they had succeeded in establishing one only of the two defenses alleged in their answer. It is the opinion of the court, on a question of fact involved in the case, but not affecting the decree."

The language of the order in the present case would seem to have the same meaning as if it had expressly stated that the action of the court resulted from the use of its discretion. It matters little what course of reasoning was pursued in order to reach the decision. It was discretionary with the court whether the appellants should be admitted as parties or not. And, in order to enable the court to exercise its discretion, it was incumbent upon it to examine the petition of the appellants and to determine from that, as well as from the arguments advanced in its support whether the petitioners had a legal right to intervene. It is a rule established by the Supreme Court that it is discretionary with the court whether persons should be admitted as parties to a pending litigation or not. By what name this discretionary power is designated by the court is of no consequence, inasmuch as it is, and must necessarily be, the discretionary power which is in reality invoked and exercised. The ESSENCE and

EFFECT of the ORDER must be considered, in order to determine what power the court exercised.

This rule was clearly defined in the case of *Potter vs. Beal*, 50 Fed. Rep., 860, in which case the United States Court of Appeals for the First Circuit said :

" The first question which meets us is whether this appeal shall be regarded as from an injunction granted by an interlocutory order under the seventh section of the act establishing this court, or whether it is to be taken hold of as from a final decree. The record states that the order was preliminary, but, of course, this is not effectual, *as it is for this court, and not for the Circuit Court, to determine that question in all cases, and the determination is to be governed by the essence of what is done and not by the appellation given to it.*"

On appeal the propriety of rightfulness of an order are the only considerations brought in question. It is wholly immaterial what were the reasons of the lower court for making the order. The only question is, Had the court the right to make it on any ground ? If it should be sustained on any ground, the ruling of the lower court must be affirmed. In the present case the only order made was a denial of the petitioners' application to intervene. This was the decision, the effective thing, and in making this order the court exercised its "*judicial discretion*," no matter what is said either within or without the order by way of stating reason or inducement. That a statement of reasons for an order or decree is without significance for any purpose of review or attempted review is well illustrated in many cases where error has been assigned in respect of the reasons or opinions of the lower courts inducing the orders or decrees from which appeals are taken.

For instance :

In *Caverly vs. Deere*, 66 Fed. Rep., 309, the Seventh Circuit Court of Appeals, speaking by WOOD, J., says :

" The opinion may be wrong and yet the finding and decree right. The question involved in the appeal is whether or not the Court erred in finding and decreeing the appeal to be without equity."

The same court in *Russell vs. Kern*, 69 Fed. Rep. 94, says :

" Error is assignable upon an order or ruling, but not upon the opinion of a court or the reasons given for a ruling."

The same court in *Evans vs. Swess Ornamental Glass Co.*, 83 Fed. Rep., 708, says :

" We are constrained to repeat and emphasize the observation that an assignment of error which is predicated upon the opinion of the court, or upon a reason given by the court for its ruling or decree, is not available (Cases). It is something done by the court—a ruling, judgment, order or decree—and not a reason therefor, which may be assigned as error."

See cases cited in the opinions last quoted.

IV.

It is well settled by numerous decisions of the Supreme Court of the United States that no one but a party to a case can appeal from a final decision rendered therein. The petitioners who sought leave to intervene never became parties to the pending causes, and therefore could not appeal even from a final decision rendered therein.

In *Connor vs. Peugh*, 18 How., 394, Mr. Justice GRIER, giving the opinion of the court, said:

"On the 5th of June, 1855, the tenant in possession came into court for the first ttme and moved to set aside the judgment and execution issued thereon and to be allowed to defend the suit for reasons set forth in her affidavit. The Court refused to grant this motion, 'whereupon the said Mary Ann Connor prayed an appeal,' &c.

"The tenant in possession having neglected to appear and have herself made defendant and confess lease, entry and ouster the judgment was properly entered against the casual ejector. *No one but a party to the suit can bring a writ of error.* The tenant having neglected to have herself made such, cannot have a writ of error to the judgment against the casual ejector.

"The motion afterwards made to have the judgment set aside and for leave to intervene was an application to the sound discretion of the court. To the action of the court on such a motion no appeal lies, nor is it the subject of a bill of exceptions or a writ of error.

See, also,
Guion vs. Liverpool, London and Globe Insurance Company, 109 U. S., 173.

The reason for this rule is obvious. The jurisdiction of the courts extends only to cases. This is true of appellate courts as well as of the lower courts (see Point V., *infra*). In order to have a case there must be *parties* as well as subject matter; and, if any one attempts to invoke the jurisdiction of an appellate court he must necessarily come as a *party* to a case, and can come only in that capacity, and must come as a party to a "case" in which a "final decision" has been rendered by the court of original jurisdiction.

This rule, as a practical matter, works no injustice to any one. The courts are open to all. Any person who has a grievance can institute a suit of his own, and bring into court all the parties necessary to a determination of his controversy. He may thus have his day

in court, and have a decision upon all matters of which he complains. There is no principle of law or of justice which demands that he have an absolute right to intervene in any suit instituted by any other person. As he has a right to institute his own suit in his own right for the determination of his controversy, so also others have similar rights, and it is neither just nor expedient that any one should have the absolute right to intrude himself into the controversies of other people. It is true that courts of equity sometimes permit a third person to intervene ; but this is done only in the discretion of the court of original jurisdiction, and a refusal to permit a third person to intervene does not deprive him of any right. If he does not become a party, no right of his can in any way be affected by proceedings in the suit. The very next day after his petition for intervention is denied, he may bring his own suit and set up all matters which he might have set up if he had been allowed to become a party. The courts are open to him the same as to all other persons.

V.

The Circuit Court of Appeals had no jurisdiction to review the order of the Circuit Court denying the petitioner's application to intervene, for the reason that such application and order do not constitute a "CASE" within the meaning of the Constitution of the United States, and of the Act of Congress of March 3, 1891, es-

tablishing the Circuit Courts of Appeals and defining their jurisdiction, and for like reason this Court has no jurisdiction to review the order of the Circuit Court of Appeals dismissing the appeal taken to it.

Section 6 of the act creating the Circuit Courts of Appeals and defining their jurisdiction provides (26 Stat. at line 826):

"That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all *cases* other than those provided for in the preceding section of this act, unless otherwise provided by law," &c.

This section gives jurisdiction to this court to review only "final decisions" in "*cases*."

The Constitution of the United States provides (Article III.):

"SECTION I. **The judicial power** of the United States shall be vested in one Supreme Court, and **in such inferior courts as the Congress may from time to time ordain and establish.** * * *

"SECTION II. (1) **The judicial power shall extend to all cases in law and equity** arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, &c., &c.

Mr. Chief-Justice MARSHALL, in *Osborn vs. Bank of the United States*, 9 Wheat., 738, 819 (1824), says, regarding the "*case*" which must be presented in court for its action before there can be any proper exercise of the judicial power:

"This clause [Constitution, art. iii., sec. 2] enables the judicial department to receive jurisdiction to the

full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. *It then becomes a case*, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States."

So, also, Mr. Justice STORY, in his *Commentaries on the Constitution*, vol. 2, sec. 1646, speaking of what constitutes a *case* within the meaning of this clause, says:

"A case, then, in the sense of this clause of the constitution, arises when some subject touching the constitution, laws or treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law. **In other words, a case is a suit in law or equity, instituted according to the regular course of judicial proceedings;** and when it involves any question arising under the constitution, laws or treaties of the United States, it is within the judicial power confided to the Union."

The petition presented by the Credits Commutation Company and Combination Bridge Company for leave to intervene and the order of the Circuit Court denying such petition do not constitute a case within the meaning of the constitution of the United States, or of the said act of Congress of March 3, 1891.

The only cases before the court were the foreclosure cases and the administrative case in which such intervention was sought, and the only appeal that could

have been had was an appeal from the "final decision" in those "*cases*." The petition for leave to intervene was only an application addressed to the discretion of the court in which the petitioner sought to become a party to those cases. There were not here two sets of cases, one being made up of the petition for leave to intervene and the order denying the petition, and the other the cases in which the invervention was sought. There was only one set of cases, and the orders denying the petition were made in that set of cases. There is, therefore, no ground whatever to claim, and it cannot be claimed, that the petitioner was a party to any *separate* "*case*," and that an appeal can be taken from the order denying his petition as from a final decision in a separate case.

As was said in Ex Parte Cutting, 94 U. S., 22: "No appeal lies from the order of Oct. 3, refusing them leave to become parties, for that was only a motion in the cause and not an independent suit in equity appealable here."

It requires but little consideration to see that this so-called appeal brings no "case" before this Court. The Court will notice that the so-called "transcripts of record" in these proceedings are entitled "Credits Commutation Company and Combination Bridge Company, Appellants," and that in each Record the appellee is the complainant in the true case in which the petition was filed;—as if the Credits Commutation Company and the Combination Bridge Company were parties to cases. The fact is clearly otherwise. A case in an appellate court must have parties as well as in any other court, and in an appellate court those only can be parties who were parties in the court of original

jurisdiction. The Credits Commutation Company and the Combination Bridge Company were not parties to any case in the Circuit Court. They did not file any complaint, nor was any filed against them; nor was any subpœna or other process issued at their instance, or directed to them; nor did they become parties after any of the suits were begun.

That the petition for leave to intervene and the order denying such petition did not constitute a separate case within the meaning of the Constitution of the United States and of the act of Congress of March 3, 1891 (26 Stat., 826), is further shown by the decisions of this Court with regard to cross bills.

A cross-bill in a suit in equity is an application to the court of much higher dignity than a mere petition for leave to intervene, for several reasons: First, because a cross-bill is necessarily filed by a party to the main suit; and, second, because a cross-bill involves or should involve the same matters as the main suit; and, yet in many instances this Court has held that it had no jurisdiction of an appeal from a decree dismissing a cross-bill alone.

For example, in *Ayres vs. Carver*, 17 How., 591, the court had before it a decree of a district court which dismissed a cross-bill; and *this Court dismissed for want of jurisdiction an appeal from such decree.* The Court said, by NELSON, J. (p. 595):

"It is manifest, from this brief reference to the doctrine, that any decision or decree in the proceedings upon the cross-bill is not a final decree in the suit, and, therefore, not the subject of an appeal to this court, under the 22d section of the judiciary act.

The decree, whether maintaining or dismissing the bill, disposes of a proceeding simply incidental to the principal matter in litigation, and *can only be reviewed on an appeal from the final decree disposing of the whole case.* That appeal brings up all the proceedings for re-examination, when the *party* aggrieved by any determination in respect to the cross-bill has the opportunity to review it, as in the case of any other interlocutory proceeding in the cause.

"For these reasons *the appeal in this case must be dismissed for want of jurisdiction*, and the case remanded to the court below.

See, also, to the same effect :

Ex parte Railroad Company, 95 U. S., 221, 225.

If a cross-bill is not a separate case so that a decision dismissing on the merits is not thus reviewable, much less is a mere motion for leave to intervene. There is no jurisdiction of an appeal from the denial of such motion.

Threfore, even if the petitioners had been parties to the cases in which the order was made denying the petition, they could not make separate and direct appeal from such order as if the petition and order constituted a "case" for the appellate court. There is only one set of cases, and these appeals could in no event be brought up as separate cases.

For the convenience of the Court we print in an appendix so much of the opinion of the CIRCUIT COURT OF APPEALS as has not already been printed at pages 4 *et seq.* of this brief.

VI.

Motion to Affirm.

If the Court should hold, for any reason, that it has jurisdiction to consider these appeals and dispose of them otherwise than by dismissal, then we submit that the decisions of the court below should be affirmed upon our motion to affirm, coupled, under the rule, with the motion to dismiss.

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APPENDIX.

Opinion of Circuit Court of Appeals.

(Omitting Statement of Facts printed *ante*, pp. 4 *et seq.*)

"The motion to dismiss the several appeals is grounded on the proposition that the order from which the several appeals were taken was not a final judgment or decree from which an appeal will lie to this court, and upon the further proposition that the action of the lower court in refusing leave to intervene is not is not reviewable on appeal, inasmuch as it rested in the sound discretion of the chancellor to admit or reject the intervention. Both of these positions are, in our opinion, well taken. The order denying leave to intervene was not 'final' within any of the definitions usually given of a final order or decree, inasmuch as it did not dispose of the petitioners' alleged right to form a junction with the main line of the Union Pacific Railroad, which was the substantial right asserted, but left them at full liberty to litigate that question by an original bill, or by any other method of procedure which they saw fit to adopt. The Trial Court could not, and did not, finally adjudicate any of the questions which were presented by the intervening complaint for the reason that it refused to give the petitioners a standing in Court to be heard with respect to such questions, and also refused to permit the intervening complaint to be filed and become a part of the record. None of the issues, therefore, which were tendered by the petitioners in their intervening complaint ever passed under judicial review in such a manner to estop the petitioners from tendering like issues on any future occasion because the Trial Court refused to allow such issues to be incorporated into the pending suits in such a form that they could be tried and determined. When such action is taken—that is to say, when leave to intervene in an equity case is asked and refused—the rule, so far as we are aware, is well settled that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the

claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. Such orders not only lack the finality which is necessary to support an appeal, but it is usually said of them that they cannot be reviewed, because they merely involve an exercise of the discretionary powers of the trial court (*Ex parte* Cutting, 94 U. S., 14; Hamlin vs. Trust Co., 47 U. S. App., 422, 428, 429, 24 C. C. A., 271, and 78 Fed., 664; Jones and Laughlins vs. Sands, 51 U. S. App., 153, 157, 25 C. C. A., 233, and 79 Fed., 913; *In re* Street, Petitioner, 8 U. S. App., 645, 650, 10 C. C. A., 446, 62 Fed., 218).

"It is doubtless true that cases may arise where a denial of the right of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled, and can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration, to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated. In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervenor's claim by denying him all right to relief. The cases at bar, however, are not of that character. The petitioners were under no obligation to intervene in the litigation against The Union Pacific Railway Company to preserve their alleged right to form a junction with the road of that company when they should have completed their own road to a suitable junction point. The question which they sought to litigate in the pending litigation could, we think, with more propriety and with less difficulty have been litigated by an independent bill after they had completed or were about completing their line to a suitable junction point. Prior to that time the questions which they sought to raise by means of the intervening petition were speculative questions, which the lower court, as we think, very properly refused to consider or determine.

"It was suggested in argument that, as the lower court saw fit to insert a clause in its order that it had not refused leave to intervene "as a matter of discretion" but because the petitioners had no legal right to intervene, therefore the motion to dismiss is not tenable, so

far as it is based on the discretionary character of the order. The answer to this suggestion is that the trial court, by inserting such a clause in its orders explanatory thereof, could not give an effect to the order which was in any respect different from the effect which it had by virtue of the nature of the proceeding in which the order was made. The intervening petition merely invoked the discretionary power of the court, and it could exercise no other power in the premises, whatever the purpose of the court or its own declarations on the subject may have been. The fact is that the lower court simply exercised its discretionary authority in denying leave to intervene, and it did not succeed in rendering a judgment upon the merits of the petitioners' claim which will conclude them in any subsequent suit, although it may have intended to do so. As it is now well settled, since the decision in McLish vs. Roff, 141 U. S., 661; 12 Sup. Ct., 118, that an appeal will only lie to this court from orders or decrees which are final in their character, and which involve something more than the exercise of purely discretionary powers, except in some cases for which special provision is made by the seventh section of the act under which this court was created (26 Stat., 826, C. 517), it follows that the appeal cannot be entertained, and that the motions to dismiss the same must be sustained. It is so ordered."

FEB 24 1900
JAMES H. MCKENNEY, Clerk

By. of Atty. Gen. (Griggs's Brief)

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Feb. 24, 1900.

No. 220.

THE CREDITS COMMUTATION COMPANY and THE COMBINATION BRIDGE COMPANY,
Appellants,

vs.

THE UNITED STATES OF AMERICA ET AL.,
Appellees.

Also No. 234.

SAME APPELLANTS,

vs.

F. GORDON DEXTER and OLIVER AMES, Second, Trustees, ET AL.,
Appellees.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Brief for Appellee The United States of America on Motions to Dismiss Appeals.

JOHN W. GRIGGS,
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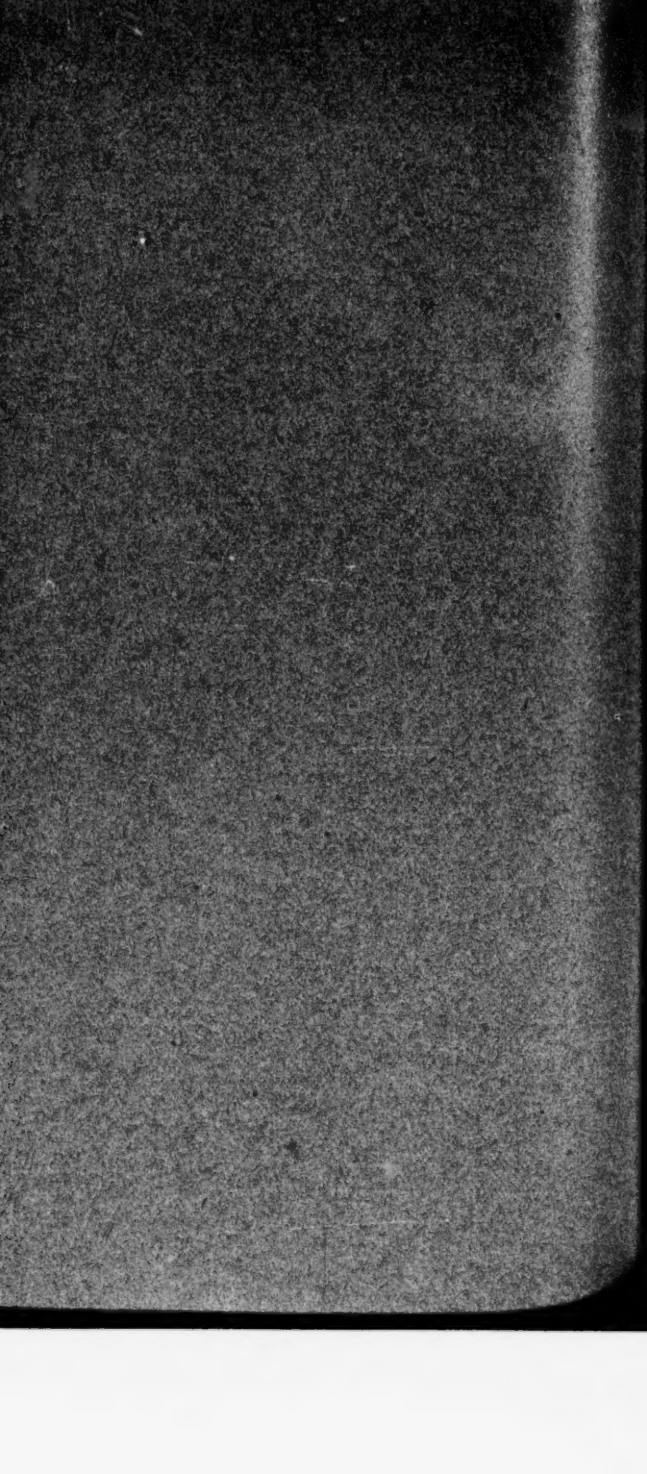

Supreme Court of the United States.

OCTOBER TERM, 1899.

THE CREDITS COMMUTATION COMPANY and the COMBINATION BRIDGE COMPANY, Appellants, vs. THE UNITED STATES OF AMERICA *et al.*, Appellees.	No. 233.
THE CREDITS COMMUTATION COMPANY and the COMBINATION BRIDGE COMPANY, Appellants, vs. F. GORDON DEXTER and OLIVER AMES, Second, Trustees, *et al.*, Appellees.	No. 234.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Brief for appellee The United States of America on motions to dismiss appeals.

STATEMENT.

In May, 1897, the Credits Commutation Company filed in the Circuit Court of the United States for the District of Nebraska a petition for leave to intervene and become a party in certain causes then pending in that Court. Subsequently, an amendment to that petition, and a like petition of the Combination Bridge Company were filed in said causes (Rec. No. 233, pp. 43, 149, 151).

One of the causes in which intervention was sought was a suit in equity commenced in January, 1897, by the United States of America vs. The Union Pacific Railway Company and others for the foreclosure of the subsidy mortgage and lien of the Government upon the Union Pacific Railroad, extending from Council Bluffs, Iowa, to a point five miles west of Ogden, Utah, the subsidy debt amounting, with accrued interest, to about $58,000,000.

The other cause was a suit in equity brought by F. Gordon Dexter and Oliver Ames, Second, as trustees of the first mortgage of The Union Pacific Railroad Company, for the foreclosure of that mortgage covering the same property. In this suit the United States had entered its appearance as a party defendant.

At the time the intervention was sought these causes were about ready for final decree.

The petition of the Credits Commutation Company for leave to intervene (Rec., pp. 43 *et seq.*) alleged as grounds of the application that the petitioner was the owner of the capital stock of a combined railroad and wagon bridge then recently completed across the Missouri River at Sioux City, Iowa, and that, as beneficiary under an assignment, it was entitled to three-

fourths of the capital stock of the Sioux City and Northern Railroad, extending northerly from Sioux City about one hundred miles (said Sioux City and Northern stock carrying with it the stock of a terminal company having terminal privileges in Sioux City), and the stock of the Sioux City, O'Neill and Western Railroad, running one hundred and thirty miles west from Sioux City, Iowa, to O'Neill, Nebraska. The petitioner claimed further rights, then in controversy and litigation, respecting prior claims upon the properties of these several companies, and alleged that the petitioner owned or held a controlling interest in certain other industries at Sioux City, and that it was one of the motives or objects of the petitioner in its organization and in the combinations of its properties to secure "a connection thereof with The Union Pacific Railway Company by building or causing to be built and extended a railroad from said Sioux City in a general southwesterly direction to a junction with the said Union Pacific Railway as aforesaid."

The petition was largely argumentative and generally adverse to the proceedings of the United States in the foreclosure of its statutory lien. The petitioner contended that the Government was without power to foreclose and sell under its lien the property of the railway company to satisfy the subsidy debt, and that the only remedy of the Government was to possess the property by forfeiture and, if necessary, redemption of prior liens, thereby acquiring ownership of the property. The petitioner also sought to intervene for the alternative purpose of securing such provisions in the decree, in case of foreclosure, as it claimed would be useful to protect a right, alleged to exist under the Congressional legislation incorporating the railroad company, to con-

nect its properties with the Union Pacific Railroad, in the event that it should carry out its purpose to build any of its properties to a point of connection.

The petition of the Combination Bridge Company (Rec. pp. 151 *et seq.*), the stock of which was owned by the Commutation Company, was in substance an affirmation and adoption of the matters contained in the Commutation Company's petition. It included a recital of the corporate authority of the petitioner and a prayer for leave to intervene in the event of denial of the Commutation Company's petition.

Orders were entered by the Circuit Court denying the prayers of the petitions for leave to interve. For convenient reference this order of the Circuit Court in the Government case (which is identical in terms with that made in the other causes) is printed as an appendix to this brief. From these orders appeals to the Circuit Court of Appeals were taken (Rec., p. 157). Subsequently, motions were made by the United States to dismiss the appeals taken to the Circuit Court of Appeals (Rec., pp. 173–4), and these motions were by that Court sustained and the appeals dismissed (Rec., p. 181). From the orders of the Circuit Court of Appeals sustaining these motions and dismissing the appeals the present appeals to this Court were taken. The present motions are made to dismiss the appeals to *this* Court from the orders of the Circuit Court of Appeals dismissing the appeals to *that* Court.

The grounds of the present motions to dismiss are as follows :

First. The order of the Circuit Court of the United States for the District of Nebraska, from which said appeal to the Circuit Court of Appeals was taken was

not a FINAL DECISION of the said Circuit Court of the United States within the meaning of Section 6 of the Act of Congress, approved March 3, 1891, entitled: "An Act to establish Circuit Courts of Appeals and to define and regulate in certain causes the jurisdiction of the Courts of the United States, and for other purposes," and hence said Circuit Court of Appeals had no jurisdiction over the appeals taken to it, and for like reason the Supreme Court has no jurisdiction over the present appeals.

SECOND. The application of the appellants for leave to intervene in the pending causes was addressed to the judicial discretion of the Circuit Court of the United States for the District of Nebraska, and the discretionary powers exercised by said Court in its action in denying such application could not be reviewed by the Circuit Court of Appeals and will not be reviewed by this Court.

THIRD. The application to intervene and the appeal from the order denying said application, and from the order of the Circuit Court of Appeals dismissing the appeals taken to that Court are attempted proceedings and litigation on the part of the appellants against the United States of America which has never consented that such proceedings be brought against it, but has objected and still does object to the same.

And also the ground resting in the facts appearing by way of supplemental statement in the motion, from which it appears that the foreclosures have long since gone to final decrees and sale and that the debt and claim of the Government have been fully paid in cash out of the proceeds of said sales.

ARGUMENT.

The Circuit Court of Appeals had no jurisdiction over the appeals taken to it, and consequently the Supreme Court has no jurisdiction over the present appeals, and the present motions in this court to dismiss the appeals taken to it must be sustained.

The jurisdiction of the Federal appellate courts is limited by statute and does not (except in certain specified cases, of which the present proceeding is not one) embrace the review of other than FINAL DECISIONS in cases presented by appeal, writ of error or *certiorari*.

The decision, in order to be reviewable, must be FINAL, and the Act of Congress of March 3, 1891, establishing the Circuit Court of Appeals has made no change in this fundamental requirement.

McLish vs. Roff, 141 U. S., 661.
Chicago, St. P., Minn. & O. Ry. Co. vs. Roberts, 141 U. S., 690.
American Construction Co. vs. Jacksonville, &c., R. R. Co., 148 U. S., 372.
Kirwan vs. Murray, 170 U. S., 205.

The orders of the Circuit Court of the United States for the District of Nebraska, denying the appellants leave to intervene, were not FINAL DECISIONS of that Court. Hence they were not appealable orders. This is perfectly well settled.

United States vs. Girault, 11 How., 22.
Dainese vs. Kendall, 119 U. S., 53, 54.
Ex parte Cutting, 94 U. S., 414.
Toledo, St. L. & Kansas City Ry. Co. vs. Continental Trust Co., 95 Fed. Rep., 497, 536.

Orders granting or denying leave to intervene in pending cases are discretionary and hence not appealable. Decisions which rest in the judicial discretion of a court of original jurisdiction cannot be reviewed in an appellate court.

Cook vs. Burnley, 11 Wallace, 672, 676.
Ex parte Cutting, *supra.*
Connor vs. Peugh, 18 How., 394.
Hamlin vs. Railway Company, 78 Fed. Rep., 664.
Lewis vs. Railroad Co., 62 Fed. Rep., 218.
Smith vs. Glasgow Investment Co., 47 Fed. Rep., 332.
United States vs. Thomas, 151 U. S., 577.

The character of the order of the Circuit Court was not altered by reason of the recital made therein that the petitions for leave to intervene were denied "not as a matter of discretion, but because such petitions do not state facts sufficient to show that the petitioners or either of them have a legal right to intervene."

Recitals by a court, in its order, of opinions of law or fact, or by way of inducement, are immaterial and give to such orders or decrees no different aspect or character for the purpose of review or of determining whether they are reviewable. Such determination is to be governed solely by the essence of what is done and not by the appellation given to it in the order.

Corning vs. Troy Iron and Nail Factory, 15 How., 451, 464.
Potter vs. Beal, 50 Fed. Rep., 860.
Caverly vs. Deere, 60 Fed. Rep., 309.
Russell vs. Kern, 69 Fed. Rep., 94.
Evans vs. Suess Ornamental Glass Co., 83 Fed. Rep., 708.

Applications by strangers for leave to intervene in pending causes are addressed to and invoke the discretionary power of the Court and in the determination of such applications the discretionary power is, in judicial contemplation, the only power exercised or exercisable.

Whether discretionary or not, however, the order denying the application of the appellants for leave to intervene in the pending causes lack the primary and indispensable requirement for appeal—*i. e.*, finality.

The appeals in this Court have titles wholly different from those of the causes in the Circuit Court in which the proceedings for intervention were had. The appellants have undertaken to carve out of the pending causes for the foreclosure of mortgages certain proceedings composed of petitions for leave to intervene and the orders denying these petitions, and to make these proceedings, which are in reality only an incident in the pending causes, the subject of a separate and independent appeal. There is no CASE, there are no PARTIES, there is no FINALITY OF DECISION, the three elements which are requisite in order to confer jurisdiction upon the appellate courts.

The attempted intervention and the appeals from the orders denying the same are efforts on behalf of the appellants to proceed against the United States in its own courts and without its consent.

The anomalous character of the attempted interventions becomes even more conspicuous in this phase of the matter. While assuming to supplant the constituted officers of the United States in the protection of the interests of the Government, the scheme of the petitioners as disclosed by their petitions (Rec., p. 187 *et seq.*) was adverse to the foreclosure and remedies which

were then being pursued on behalf of the United States and which resulted in the payment of the entire debt to the Government in cash.

The outcome of these causes has become matter of public history through the messages of the President to Congress and the reports of the Attorney-General, and this outcome is thus properly a subject of judicial cognizance. The foreclosure instituted by the Government and that instituted by the trustees of the prior lien were carried to final decrees and sales, and the Government realized in cash the entire amount of its indebtedness, principal and interest —namely, more than $58,000,000. This amount has long since been paid, and the property was long since transferred to the purchasers subject to ample protection in the decrees of all rights of the Government in all other capacities than that of creditor, as to which its rights were fully satisfied.

In the light of these facts—of which the Court will take judicial cognizance—it becomes evident that the prosecution of the present appeals can have no purpose other than those improper purposes within the contemplation of the rule of this Court under which the alternative motion to affirm is made by the appellee.

The motions to dismiss the present appeals in this Court should be sustained.

JOHN W. GRIGGS,
Attorney-General.
JOHN C. COWIN,
Special Counsel for United States.

APPENDIX.

Copy of Order of Circuit Court Dismissing Petitions for Leave to Intervene in the Government Cause.

UNITED STATES CIRCUIT COURT,

DISTRICT OF NEBRASKA.

IN EQUITY.

UNITED STATES OF AMERICA,
Complainant,

vs.

THE UNION PACIFIC RAILWAY COMPANY ET AL.,
Defendants.

And now, this cause coming on to be heard on the petition of the Credits Commutation Company for leave to intervene in the above-entitled causes, and also upon the amendments to said petition presented on the hearing and taken as part of said petition, and also upon the supporting petition of the Combination Bridge Company, also presented to the Court on said hearing, and upon the order of this Court made on April 28th, 1897, upon the said petition of the Credits Commutation Company; and it appearing to the Court here that the several parties had been notified of the time and place of said hearing as specified and

required by the said order of this Court, and there appearing upon this hearing for the Credits Commutation Company and for the Combination Bridge Company, petitioners, Mr. John C. Coombs and Mr. Henry J. Taylor, for the Union Pacific Railway Company and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane and Frederic R. Coudert, Receivers thereof, Mr. John F. Dillon and Mr. W. R. Kelly, for F. Gordon Dexter and Oliver Ames, 2nd, trustees, Mr. Winslow S. Pierce, and for the United States of America, Mr. George Hoadly and John C. Cowin; and now, the Court having heard arguments of counsel and being fully advised in the premises, it is

Ordered, that the prayers of the petitioners for leave to intervene herein be and the same are hereby denied, not as matter of discretion, but because said petitions do not state facts sufficient to show that the petitioners or either of them have a legal right to intervene, and upon prayer of the petitioners an appeal to the Circuit Court of Appeals is hereby allowed. The bond on such appeal is fixed at the sum of one thousand dollars.

Dexter and Ames, trustees, complainants, and the United States of America, the Union Pacific Railway Company and the said Receivers, by their respective counsel duly excepting to such part of this order as grants an appeal.

May 22, 1897.

WALTER H. SANBORN,
Circuit Judge.

No. 233.

Office Supreme Court U.
FILED
JAN 27 1900
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1899. No. 233.

THE CREDITS COMMUTATION COMPANY and the COMBINATION BRIDGE COMPANY,
Appellants,

vs.

THE UNITED STATES ET AL.,
Appellees.

TO JOHN C. COOMBS, ESQ., and HENRY J. TAYLOR, ESQ.,
Counsel for Appellants above named :

Please take notice, that on the 26th day of February, 1900, at the opening of the Court, or as soon thereafter as counsel can be heard, the motions, of which copies are herewith served on you, will be submitted to the Supreme Court of the United States for the decision of the Court thereon.

Also herewith served is a copy of the brief or argument to be submitted with the said motions in support thereof.

Dated January 27, 1900.

WINSLOW S. PIERCE.

Counsel for appellees F. Gordon Dexter and Oliver Ames, Second, Trustees, for the purposes of these motions.